Supreme Court, U.S.
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No. 91-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NICHOLAS G. NAVARRO, SHERIFF OF BROWARD COUNTY,

Petitioner,

—v.—

REVIEW PUBLICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT REVIEW PUBLICATIONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below correctly held that a sheriff was not entitled to avoid personal liability, under the doctrine of qualified immunity, for having severed a 20-year advertising relationship with a newspaper to retaliate against it for publishing an article criticizing his performance of his official duties.

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BRIEF OF RESPONDENT REVIEW PUBLICATIONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Review Publications, Inc. ("Review Publications")[1] respectfully submits that a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and because the decision below is in all respects correct.

1 Pursuant to Supreme Court Rule 29.1, Review Publications advises the Court that American Lawyer Media, L.P., a limited partnership affiliated with Time Warner Inc., owns all the assets of Review Publications, including the *Broward Review*.

STATEMENT OF THE CASE

On November 17, 1988, the *Broward Review*, a newspaper published every weekday throughout Broward County, Florida, published on its front page a news story bearing the headline "NAVARRO FAILED TO ACT ON CORRUPTION WARNINGS". The article was accompanied by a large photo of Broward County Sheriff Nicholas G. Navarro ("the November 17th article"). Pet. App. 4-5 (¶ 11).[2] The article reported that Sheriff Navarro had failed to investigate serious charges that a drug trafficker had bribed members of his staff. *Id.* That very morning, shortly after he learned about the article and in direct retaliation for it, Sheriff Navarro personally ordered his subordinates to terminate a 20-year practice of placing public notices for sheriff's sales and forfeiture proceedings in the *Broward Review*. Pet. App. 5-7, 8 (¶¶ 14-18, 24).[3] This litigation ensued.

On June 7, 1989, Review Publications, owner of the *Broward Review*, instituted this action against Sheriff Navarro and Broward County before the United States District Court for the Southern District of Florida.[4] The Complaint, which was brought under 42 U.S.C. § 1983 (1988), alleged that Sheriff Navarro, as the highest ranking law enforcement offi-

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2 References to "Pet. App. _____" are to pages of the appendix to the petition for a writ of certiorari. References to "Pet. _____" are to the petition itself.

3 The district court determined that on the morning of November 17, 1988, "Commander Judy Meyer of the Broward Sheriff's Office Civil Division was called out of a Commanders' Meeting by one of the Sheriff's secretaries to take a telephone call from Sheriff Navarro. In that telephone conversation, Sheriff Navarro ordered Commander Meyer 'not to use *The Broward Review* in the future.' " Findings of Fact and Conclusions of Law, ¶ 17 (Record Excerpts at tab 7). The text of this finding of fact reprinted at Pet. App. 5-6 (¶ 16) omits the word "future".

4 The Complaint initially named Sheriff Navarro as a defendant in both his official and individual capacities. The district court later granted Broward County's motion, to which plaintiff consented, to dismiss plaintiff's claim against the Sheriff in his official capacity because it was redundant of the claim against the County.

cer of Broward County, had personally decided to withhold Broward County advertising from plaintiff's newspaper in retaliation and as punishment for the exercise of its First Amendment right freely to report about Sheriff Navarro and the workings of the Broward County Sheriff's Office. The plaintiff sought injunctive relief and compensatory damages against Sheriff Navarro and Broward County. Punitive damages were also sought against Sheriff Navarro in his personal capacity.

At the conclusion of a two-day trial before United States District Judge James W. Kehoe, the court ruled in favor of the plaintiff. Based on his own evaluation of the credibility of the witnesses, Judge Kehoe found that despite Sheriff Navarro's sworn testimony to the contrary,[5] the evidence demonstrated "that Sheriff Navarro's decision to terminate advertising of Sheriff's sales and forfeiture proceedings in the *Broward Review* was substantially motivated by retaliation for the publication of the November 17th article." Pet. App. 14 (¶ 6). The district court also concluded that "[b]ecause Sheriff Navarro fully understood and reasonably should have known that a public official cannot retaliate against a newspaper for its exercise of First Amendment rights," the Sheriff was not permitted to avoid liability under the doctrine of

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5 Despite the undisputed evidence that the Sheriff's decision to cease advertising in the *Broward Review* was communicated to his subordinates on the very morning on which the article criticizing the Sheriff was published, Pet. App. 5-7 (¶¶ 14-18), that the Sheriff gave no contemporaneous explanation for his decision to his subordinates or to the *Broward Review*, Pet. App. 8 (¶ 25), and that the Sheriff criticized the *Broward Review* in general and the November 17th article about him in particular, Pet. App. 6, 7 (¶¶ 17, 19), Sheriff Navarro took the stand at the trial and denied under oath that his decision to terminate advertising had been affected by the article about him or his reaction to it. Trial Transcript, vol. II, at 41. On the contrary, he testified at trial that the sole reason for his terminating advertising in the *Broward Review* was to advertise in a newspaper of wider circulation. Pet. App. 8 (¶ 25).

qualified immunity. Pet. App. 15 (¶ 9).[6] The district court ordered judgment to "be entered in favor of the Plaintiff against the County for the action of Sheriff Navarro in his official capacity and against Sheriff Navarro in his personal capacity." Pet. App. 17. It awarded compensatory damages against both defendants in the amount of $22,710.14, but declined to award injunctive relief or punitive damages. *Id.*

In a subsequent four-page opinion, the district court denied Sheriff Navarro's motion for a new trial (or in the alternative to alter or amend the judgment) based on his argument that liability should not have been imposed against him in his individual capacity by virtue of the doctrine of qualified immunity. Pet. App. 21-25. The court undertook a detailed analysis of the law at the time of the conduct in question and reiterated, quoting from this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987), that " 'in light of pre-existing law the unlawfulness of [Sheriff Navarro's conduct was] apparent.' " Pet. App. 25.

Sheriff Navarro appealed from the judgment, but Broward County (which is also liable for the full amount of the judgment) did not. On August 16, 1991, the United States Court of Appeals for the Eleventh Circuit unanimously affirmed, without opinion, the judgment against Sheriff Navarro. Sheriff Navarro's petition for rehearing and suggestion for rehearing en banc was denied on November 1, 1991, no member of the court having requested that a vote on rehearing be taken.

SUMMARY OF ARGUMENT

The unworthiness of this case for review by this Court is demonstrated at the outset by the fact that none of the abstract issues identified in the petition, all of which relate to the definition of "clearly established" law for the purpose of

6 The district court's detailed Findings of Fact and Conclusions of Law are set forth, albeit inaccurately, at Pet. App. 1-17. *See* n.3, *supra*. Respondent relies upon and incorporates the district court's findings and conclusions as if fully set forth herein.

qualified immunity analysis, are of actual relevance to the case. The judgment below, as the district court itself held, falls squarely within a long line of "well-settled" authority "that '[t]he Government may not retaliate against individuals or associations for their exercise of First Amendment rights . . .' " Pet. App. 11 (¶ 2), quoting *Georgia Ass'n of Educators* v. *Gwinnett County School District*, 856 F.2d 142, 145 (11th Cir.), *reh'g denied*, 862 F.2d 879 (11th Cir. 1988). Petitioner points to no intercircuit conflict regarding this "settled" line of authority; to the contrary, he acknowledges a total identity of views of the two circuit courts of appeals that have considered this principle in suits by newspapers against county officials who severed advertising relationships to punish the newspapers for publishing articles critical of the officials' performance in public office. Pet. 11. Petitioner's attempt to concoct a purported intercircuit controversy on more abstract questions relating to the definition of "clearly established" law—even if these issues remained in controversy after this Court's elucidation of them in *Anderson* v. *Creighton*, 483 U.S. 635 (1987)—has no bearing on the correctness of the decision below.

ARGUMENT

THE ELEVENTH CIRCUIT'S APPLICATION OF A LONG-ESTABLISHED PRINCIPLE OF CONSTITUTIONAL LAW RAISES NO ISSUE WORTHY OF THIS COURT'S CONSIDERATION

There has never been any dispute in this case that where a sheriff is "personally involved in the acts depriving [plaintiff] of his constitutional rights," he can be personally liable for damages. *Ancata* v. *Prison Health Services, Inc.*, 769 F.2d 700, 706 (11th Cir. 1985). Nor has there been any dispute that the doctrine of "qualified immunity" protects only "government officials performing discretionary functions . . . [whose] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

The standard set by *Harlow* was reaffirmed and clarified by this Court in *Anderson* v. *Creighton*, *supra*, 483 U.S. at 640. In *Anderson*, this Court addressed and established the definition of a "clearly established" right for purposes of evaluating a qualified immunity defense asserted by federal law enforcement officers. This Court concluded that a wholly generalized claim of unconstitutional conduct—such as a claim that a defendant was denied "due process"—will not suffice to overcome such a defense. *Id.* This Court went on to hold that

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful*; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (emphasis added; citations omitted). In spite of this Court's express elucidation of the meaning of "clearly established" law in the qualified immunity context, Sheriff Navarro purports to seek more specific guidance from this Court as to abstract issues relating to the law of qualified immunity. As none of these issues are of actual relevance to the resolution of this case, however, their resolution by this Court would not affect the outcome below. Moreover, even if these issues were a matter of intercircuit conflict (which they are not), respondent respectfully submits that this case does not offer an appropriate or meaningful context for their clarification by this Court.

Sheriff Navarro first claims that "[t]he broadly defined principle of law used by the trial judge violated the standard established in *Anderson*, *supra*." Pet. 9. The legal principle applied by the courts below was not "a broadly stated legal truism, 'e.g., public officials shall not abridge freedom of

speech,' " as described by petitioner, Pet. 15-16, however, but the much more focused rule that " 'although the government may generally choose to place its advertising where it will, it may not make this decision in a fashion designed to punish a newspaper's constitutionally-protected speech.' " Pet. App. 12 (citing a pre-trial stipulation between plaintiff Review Publications and defendant Broward County). Indeed, the "proper 'fact specific' inquiry" proposed by petitioner, Pet. 9,[7] is *less* "particularized" than the rule actually applied by the courts below.

In any event, the "level of generality at which the relevant 'legal rule' is to be identified," *Anderson* v. *Creighton*, *supra*, 483 U.S. at 639, is not a matter of controversy among the circuits in light of *Anderson*'s guidance on the subject. *See* M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 920, at 534-35 (2d ed. 1991) ("[M]ost circuit courts have adopted a flexible approach, requiring some, but not precise, factual correspondence between the conduct at issue and the pertinent precedents.").[8]

Nor is there an intercircuit conflict regarding the second issue raised by petitioner: "what level of court decision (*i.e.*, district, circuit, or Supreme Court) is required to create a clearly established principle of law against which a public official's conduct can be judged." Pet. 10.[9] *See* M. Schwartz

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7 " '[S]hould a public official, in a situation like that confronted by Navarro, know or have reason to believe that he could not terminate a business relationship with a private company (a newspaper publisher) because that private company (newspaper publisher) did not support his policies or was otherwise publicly critical of his performance.' " Pet. 9.

8 Petitioner's suggestion, Pet. 10 n.1, that an internal conflict exists in the Eleventh Circuit regarding the definition of "clearly established" law, even if correct, is clearly not the sort of issue that merits review by this Court. Sup. Ct. R. 10.

9 The cases cited in the petition (at 14-15) to support the contention that the Third and Eighth Circuits "have bluntly held that no point of law is clearly established until it is decided by the United States

& J. Kirklin, *supra*, at 536 ("The circuit courts generally agree that there need not be a decision on point of the United States Supreme Court, or even of the particular circuit, for the law to be clearly established."). In any event, there was ample authority issued from this Court, the Eleventh Circuit itself, and the Fifth Circuit which fully supported the decisions below.

As long ago as 1972, in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), an action brought under 42 U.S.C. § 1983 by a state college professor who claimed that the college had failed to renew his annual employment contract in retaliation for his public criticism of its policies, this Court held:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Supreme Court" hardly stand for this proposition. *See Chincello* v. *Fenton*, 805 F.2d 126, 134 (3d Cir. 1986) ("[T]his is not a case in which there is a Supreme Court case or a consensus among the circuits endorsing the legal norm the defendant official is alleged to have violated."); *Schlothauer* v. *Robinson*, 757 F.2d 196, 197 (8th Cir. 1985) (per curiam) (where state law had expressly permitted the defendant law enforcement officer's warrantless felony arrest in a suspect's home and the Supreme Court had " 'expressly left open' " the issue of the constitutionality of such an arrest, there was no clearly established constitutional violation).

408 U.S. at 597. The Court recognized in *Perry* itself that it had applied the principle that government officals cannot penalize the exercise of First Amendment rights in a wide variety of circumstances. *Id. See, e.g., Speiser* v. *Randall*, 357 U.S. 513 (1958) (veterans cannot be denied state tax exemptions on the basis of their refusal to take a loyalty oath); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (government may not penalize welfare applicant by withholding benefits on the basis of her religious-based refusal to work on Saturdays); *Thomas* v. *Review Board, Indiana Employment Security Division*, 450 U.S. 707 (1981) (state cannot deny unemployment benefits to applicant on the ground that he refused, for religious reasons, to work in the arms production industry).

Moreover, as the district court below correctly held,

> [The Eleventh] Circuit has affirmed [ ] the principle that public official[s] "may not retaliate against individuals or associations for their exercise of First Amendment rights . . ." *Georgia Association of Educators* v. *Gwinnett County School District*, 856 F.2d 142, 145 (11th Cir. 1988) . . . [T]he Eleventh Circuit . . . has expressly extended [the principle's] protection to a variety of situations. *See, e.g., Georgia Association of Educators*, 856 F.2d at 145 & n.4 (association engaged in advocacy), *Little* v. *City of North Miami*, 805 F.2d 962, 967-68 (11th Cir. 1986) (counsel engaged in litigation against a municipality); *Bridges* v. *Russell*, 757 F.2d 1155, 1156 (11th Cir. 1985) (prisoner); *Cate* v. *Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983) (civil defendant sued by government for malicious prosecution); *Wilson* v. *Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979) (criminal defendant).

Pet. App. 23. And, as the petition itself concedes, the decision below reflects the total agreement of the United States Courts of Appeals for the Fifth and Eleventh Circuits on the principle that the First Amendment bars public officials from retaliating against newspapers that criticize their performance

in public office by withdrawing government advertising from their pages. *See North Mississippi Communications, Inc.* v. *Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986).[10] In a similar case involving the punitive withdrawal of funding from a state university newspaper by the university president, *Joyner* v. *Whiting*, 477 F.2d 456, 460 (4th Cir. 1973), the Fourth Circuit also reaffirmed "the precept that freedom of expression may not be infringed by denying a privilege [,]" citing *Sherbert* v. *Verner*, *supra*, 374 U.S. at 404.

Given the clarity of the law in this area, and given its application to protect a variety of individuals and entities, the court below was amply justified in affirming the trial court's conclusion that Sheriff Navarro "fully understood and reasonably should have known," Pet. App. 15 (¶ 9), that his conduct could not be squared with the First Amendment. The petition's suggestion that the Sheriff was entitled to qualified immunity because no decision of this Court or of the Eleventh Circuit "involved a public official's decision to cease advertising in a private newspaper," Pet. 16,[11] completely

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10 Inexplicably, petitioner attempts to cast doubt on the Fifth Circuit holding in 1986 in *North Mississippi Communications* v. *Jones*, *supra*, that "it would violate the Constitution for the [County] Board to withhold public patronage, in the form of its advertising, from the Times in retaliation for that newspaper's exercise of first amendment rights", 792 F.2d at 1337, because the Fifth Circuit in that opinion *reversed* a directed verdict in favor of the defendant public officials and remanded the case for factual findings on the question of whether the officials' motivation for their action against the newspaper was indeed retaliatory. Pet. 12-13; *see also* 792 F.2d at 1337. The Fifth Circuit has reiterated its 1986 holding in two subsequent opinions in the same litigation. *See* 874 F.2d 1064, 1065 (5th Cir. 1989); 951 F.2d 652 (5th Cir. 1992).

11 Despite its suggestion that only decisions of this Court or the Eleventh Circuit involving retaliatory government withdrawal of advertising from a newspaper would be binding on the Sheriff, Pet. 16, the petition cites to an unrelated line of cases issued out of other circuits, all of which involved a completely different kind of allegation: chal-

ignores *Anderson*'s holding that "[t]his is not to say that an official action is protected by qualified immunity unless the very action is question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, *supra*, 483 U.S. at 640. The logical result of petitioner's argument is that

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lenges by independent contractors to dismissals based solely on their political affiliation. Pet. 17, citing *Triad Associates, Inc.* v. *Chicago Housing Authority*, 892 F.2d 583, 585 (7th Cir. 1989) (alleged retaliatory replacement of plaintiff security services contractor with contractor "who supported the political aspirations of [the Chairman of the City Board of Commissioners] and the [Mayor Harold] Washington administration"); *Messer* v. *Curci*, 881 F.2d 219, 220 (6th Cir. 1989) (en banc) ("allegation of political patronage hiring [of seasonal maintenance workers], standing alone, does not state a claim for violation of 42 U.S.C. § 1983"), *vacated and remanded*, 110 S. Ct. 3233 (1990); *Horn* v. *Kean*, 796 F.2d 668, 669 (3d Cir. 1986) (en banc) (plaintiffs "allege[ ] that their dismissals as motor vehicle agents were based on political party affiliation"); *LaFalce* v. *Houston*, 712 F.2d 292, 293 (7th Cir. 1983) (plaintiff alleges that city Mayor " 'award[ed] the contract to another bidder, Ace Sign Company, because the operators of Ace Sign Company were political supporters of Defendant [Mayor] while Plaintiff was not' "); *Sweeney* v. *Bond*, 669 F.2d 542, 544 (8th Cir. 1982) ("Plaintiffs [fee agents] alleged their dismissals were based solely on their political affiliation. . . ."") (footnote omitted); *Fox & Co.* v. *Schoemehl*, 671 F.2d 303, 304 (8th Cir. 1982) ("[P]laintiffs' complaint alleged that defendant Vincent Schoemehl and his Chief of Staff, John Temporiti, dismissed plaintiffs as city auditors solely because of plaintiffs' political affiliation. . . ."); *Rivera Diaz* v. *Puerto Rico Telephone Co.*, 724 F. Supp. 1069, 1070 (D.P.R. 1989) ("Plaintiff [contractor] further contends that it was the policy of the PRTC [Puerto Rico Telephone Company] and the Individual Defendants to give preference to members of the PDP [Popular Democratic Party] and to discriminate against members of other political parties. . . ."). These cases are completely different in their constitutional underpinnings and their facts from this one, in which there was not one iota of evidence in the record to suggest that the *Broward Review* had any particular political loyalty or affiliation, let alone that the Sheriff knew and disliked any such supposed affiliation. Instead, the evidence was overwhelming that the Sheriff was engaged not in an act of political patronage arguably sanctioned by custom, but in an effort at retaliation against a newspaper that had reported on his office's neglect of public duty.

a public official will be absolutely immune from liability, except in the unlikely event that this Court has previously passed on the unlawfulness of the particular action taken by the official against the particular type of entity or individual. *Anderson* rejected such a rule. *Anderson* is clearly controlling in the context of this case, as the district court below correctly held. Pet. App. 25.

Finally, issues raised by petitioner regarding the appropriate " 'buffer' period between the date that a legal right becomes clearly established and the date at which a public official is charged with having operating knowledge of the existence of that legal right," Pet. 10, and the effect of pending appellate proceedings on a clearly established legal principle, *id.*, could not appropriately be decided in the context of this case, as their resolution would have absolutely no bearing on its outcome. All the opinions relied on by the courts below in rejecting the Sheriff's qualified immunity defense were decided well before November 17, 1988, the date on which the Sheriff ordered his subordinates to withdraw advertising from the *Broward Review*.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 2, 1992

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